86-392

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

No. _____

ELI GORDON, GERALD TILLINGER and SEYMOUR TILLINGER, A COPARTNERSHIP d/b/a BALSAM VILLAGE MANAGEMENT COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether when three unlawfully discharged employees are offered unconditional reinstatement prior to the National Labor Relations Board's (hereinafter "NLRB") hearing and all three voluntarily refuse to accept reinstatement and the new work force consists of six new uninvolved employees, none of whom have chosen union representation, a bargaining order remedy is appropriate.*

This question raises the following issues left unanswered by this Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969):

1. What type of detail and explanation must be provided by the NLRB when it issues a bargaining order?

2. What conduct and under what circumstances is a bargaining order appropriate?

3. What is the appropriate test or standard for issuing bargaining orders?

4. What is the effect of unusual and extraordinary turnover of employees before and/or after the NLRB hearing on the issuance of a bargaining order?

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*Petitioner also disagrees with the finding that it violated Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the "NLRA") by discharging the three employees. However, in view of judicial discretion, Petitioner seeks review only of the NLRB's bargaining order remedy which the Second Circuit affirmed.

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STATUTES:

National Labor Relations Act, 161 Stat. 136, 29 U.S.C. Section 151, *et seq.*:
Sections 8(a) (1) and (3) of the NLRA, 29 U.S.C. Sections 158(a) (1) and (3) 2, 4, 12

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

ELI GORDON, GERALD TILLINGER and
SEYMOUR TILLINGER, A COPARTNERSHIP
d/b/a BALSAM VILLAGE
MANAGEMENT COMPANY,

Petitioner,

—v—

NATIONAL LABOR
RELATIONS BOARD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Co-Partnership d/b/a Balsam Village Management Company (hereinafter the "Petitioner" or "Company") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, pp. A-1-A-11) is reported at 792 F.2d 29 (2nd Cir. 1986). The decision and order of the National Labor Relations Board (App. B, *infra*, pp. B-1-B-30), is reported at 273 NLRB No. 66 (1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 8(a) (1) and (3) of the NLRA, 29 U.S.C. Section 158(a) (1) and (3) (1982) provide:

> "Section 8(a)—It shall be an unfair labor practice for an employer—
>
> (1) "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7...
>
> xxx
>
> (3) "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."

STATEMENT OF THE CASE

A. The NLRB's Findings of Fact*

Petitioner owns and manages a 270-unit garden apartment complex in Queens County, New York. In January 1983, it employed a total of three employees—superintendent Carlos Casal (hereinafter "Casal") and porters Mario Aguila (hereinafter "Aguila") and Daniel Santos (hereinafter "Santos"). Together they were responsible for the upkeep and maintenance of the premises.

On January 20, 1983, the three employees joined Local 32B-32J, Service Employees International Union (hereinafter the "Union"). On or about January 27 or 28, 1983, the Union erroneously mailed the receipts for the union initiation fees to the Company's office.

On February 4, Casal was summoned to a meeting with owners Gerald Tillinger (hereinafter "G. Tillinger") and Eli Gordon (hereinafter "Gordon"). He was told that the Company could not afford unions. Casal was instructed to try to persuade Aguila and Santos to leave the Union. When Casal replied that Aguila and Santos would not renounce the Union, Gordon instructed him to tell them that unless they renounce the Union they will lose their jobs. Gordon also told Casal that if Casal did not cooperate and get them out of the Union, the Company would have to accept Casal's resignation.

Casal conveyed Gordon's message to Aguila and Santos, both of whom told Casal they would remain in the Union. When Casal relayed this response to Gordon and added that he too would

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* Petitioner does not agree with all of the NLRB's Findings of Fact. However, because the only issue being appealed is the remedy, the facts are set forth here as found by the Administrative Law Judge and adopted by the NLRB. (See App. pp. B-7-B-17).

remain in the Union. Gordon told Casal, "if you're going to stick to the union, ... then I accept your resignation also." He continued to urge Casal to renounce the Union himself and to persuade the other two to renounce it also. Later that afternoon, when Aguila and Santos went to the Company's office to pick up their pay checks, they were discharged—told by Gordon that their jobs were being eliminated.

On February 8, 1983, the discharged employees began picketing the Company's premises. On February 25, 1983, Gordon approached them on the sidewalk and told them that they could return to their jobs if they renounced the Union. They continued to picket until mid-April. In the meantime, the Union sent the Company a request to meet and bargain; the Company did not respond. Over time, the Company hired six different persons to perform the work of the three discharged employees. One was hired in February, two in April, and the others in June and August.

On June 8, 1983, prior to the August 1983 NLRB hearing, the Company offered unconditional reinstatement to Casal, Aguila and Santos. All declined. (See the Administrative Law Judge's Decision (hereinafter "ALJD"), Appendix p. B-11).

B. The NLRB's Finding of Violations and Its Remedy

On December 14, 1984, the NLRB issued a Decision and Order in which it unanimously adopted the Administrative Law Judge's findings and conclusions that Petitioner threatened and discharged Santos, Aguila and Casal in violation of Sections 8(a)(1) and (3) of the NLRA. The NLRB ordered the Company to make whole the three employees, but did not order their reinstatement. The employees already had declined reinstatement.

With one member dissenting, the NLRB also concluded that these violations warranted, *inter alia*, the issuance of a *Gissel*

supra, bargaining order remedy. The majority decided that the discharges for the purpose of avoiding collective bargaining warranted the issuance of a bargaining order remedy, despite the 100 percent employee turnover. Reasoning that the turnover was of the employer's making, withholding a bargaining order would reward the employer. Thus, a bargaining order remedy was warranted.

C. **Chairman Dotson's Dissent**

The NLRB's blatant error in imposing a bargaining order remedy is best explained in Chairman Dotson's dissent:

> "Chairman Dotson finds the issuance of a bargaining order in this case arising in the Second Circuit to be contrary to the law of that Circuit. See, *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984); *NLRB v. Windsor Industries*, 730 F.2d 55 (2d Cir. 1984), and cases cited therein. While recognizing the severity of the Respondent's misconduct, Chairman Dotson finds that a bargaining order would impair the rights of the Respondent's current work force. In so finding he notes that the unlawfully discharged employees declined reinstatement to their former jobs. Thus, there is no continuity in the Company's work force before and after the unfair labor practices. Further, the record fails to show that the Respondent asked the replacement employees about their Union sentiments, that the replacement employees exhibited any interest in the Union, or that the Union attempted to organize the new employees. No showing was made that the current employees discussed the Respondent's prior misconduct or that the Respondent has engaged in further antiunion activity. In view of the circumstances of this Second Circuit case, Chairman Dotson finds a bargaining order inappropriate." (NLRB Decision, p. 2-3, f.n., 5, App. p. B-11).

D. **The Court of Appeals' Decision**

The Second Circuit enforced the NLRB's order in all respects. It concluded that there was substantial evidence in the Record to support the NLRB's findings that the Company threatened to, and did, in fact, discharge Casal, Santos and Aguila because of their Union membership. Petitioner does not agree with this portion of the Second Circuit's opinion. However, it has chosen not to seek review of that decision here.

The Second Circuit also concluded that the NLRB adequately articulated its basis for issuing a bargaining order and that the 100 percent employee turnover did not mitigate against the issuance of a bargaining order remedy. It is this bargaining order remedy portion of the Second Circuit's opinion and judgment which Petitioner seeks to reverse.

The Second Circuit discussed this Court's decision in *Gissel, supra,* which held that the NLRB has discretion to issue a bargaining order remedy where serious unfair labor practices have made it unlikely that a fair representation election could be conducted. To justify a bargaining order, there has to be substantial danger that current employees would be inhibited by the employer's prior conduct. The NLRB must demonstrate that an election would likely not reflect the uncoerced preference of the current bargaining unit.*

*The significance and distinction between *Gissel* category one and two conduct has never been defined by this Court. Since that decision, the Courts of Appeal have differed between themselves and the NLRB on the meaning and interpretation of the apparently different *Gissel* standards. This Court has not explained how these possibly different tests should be applied, how much or what type of NLRB discussion is required, and what consideration should be given to abnormal and different changes in circumstances (including turnover) between the commission of the violations, the hearing and the NLRB decision.

The Second Circuit affirmed the NLRB's finding that the Company committed "hallmark" NLRA violations. As a result, a bargaining order was appropriate. The fact that there was a 100 percent turnover did not mitigate against the issuance of a bargaining order because the turnover did not establish that a fair election could now be held. The following reasoning for this conclusion, however, was insubstantial and is erroneous as a matter of law. The Second Circuit stated:

> "The new employees presumably are thus aware of the employer's past treatment of its employees who chose to be repesented by a union, and the Board was within the bounds of discretion to view that history as making the likelihood of an untainted election remote." Court of Appeals Decision (App. p. A-10) (emphasis added).

The Second Circuit's presumption is unwarranted. This conclusionary language also totally disregards and is contrary to the record. Beyond that, knowledge alone would not establish that a fair election cannot be held. As NLRB Chairman Dotson stated in his dissent, the record failed to establish the impact of the violations on the new work force.

Finally, the Second Circuit erroneously concluded that a bargaining was warranted because the turnover was caused by the Company's unfair labor practices (App. p. A-10). The Court relied on its belief that the offers of reinstatement were not made in good faith (App. p. A-11). However, these conclusions contradict the NLRB's and Second Circuit's other findings. The June 1983 offers of reinstatement were made a short four months after the employees were discharged and before the NLRB conducted its hearings. Further, whether or not the offers were properly motivated, they certainly were validly made and refused. Indeed, based on these offers, the NLRB cut off the back pay and did not order reinstatement of the three employees.

In these circumstances, the turnover was not of the employer's making, but the employees'. The unfair labor practices did not cause the turnover once valid offers of reinstatement were made and refused. Accordingly, the Second Circuit was wrong when it concluded that the employee turnover was of the Company's making and did not justify withholding a bargaining order remedy.

REASONS FOR GRANTING THE WRIT

The Need for Clarification of Gissel

A Writ of Certiorari should be granted because this case raises serious and important questions which recur with frequency before the NLRB and federal Courts of Appeal. Our case also raises crucial issues of federal labor law left unanswered by this Court in *Gissel, supra.* Moreover, the Courts of Appeal are in conflict with each other and the NLRB over the correct standard to be applied before the NLRB imposes a bargaining order. More particularly, this Court must explain *Gissel* and decide finally the correct standard for imposing bargaining orders, whether unusual and abnormal turnover is a mitigating circumstance to consider and the degree and type of discussion required of the NLRB.

This need is highlighted by the NLRB's decision in *Chandler Motors, Inc.*, 236 NLRB 1565, 1566, fn. 8 (1978), where the NLRB stated:

> We have deemed it necessary in this case to set forth in detail the reasons why we find it appropriate to grant a *Gissel* bargaining remedy, rather than to adopt and rely on the findings of the Administrative Law Judge. However, we do not thereby accede to the position of the U.S. Court of Appeals for the Third Circuit in such cases as

> *NLRB v. Armcor Industries*, 535 F.2d 239 (3rd Cir. 1976) and *Kenworth Trucks of Philadelphia, Inc. v. NLRB*, 580 F.2d 55 (3rd Cir. 1978). With all deference to the court, we believe that the administration of the Act, for which we are responsible, requires that we await a final disposition by the Supreme Court of the issue in order to resolve the conflict with other circuits on this important issue. We wish to make it clear that our adherence is intended as nothing more than respectful disagreement with the view of the Third Circuit on the matter as an attempt to protect, until the conflict is resolved by the Supreme Court, what we consider to be a substantial legal issue.

Further, in *Regency Manor Nursing Home*, 275 NLRB No. 171 (1985), Member Dennis stated in her concurring opinion:

> "Former Chairman Miller observed more than a decade ago, and it remains true today, that no decisional task 'has more perplexed this Board, or confounded the courts which review our decisions,' than determining 'whether an order to bargain is an appropriate remedy for employer interference with rights protected by Section 7 of the Act."

> "The Board has not made its perplexing task any less difficult by its proclivity for issuing or not issuing bargaining orders 'without rhyme, reason or differentiating factors other than ... conclusory statements'. The result has been inconsistent decisions, arbitrary results, and repeated circuit court refusals to enforce Board bargaining orders on the ground that they lack reviewable standards and analysis." *Slip op.*, at p. 5-6.*

**See also, Marchese Metal*, 270 NLRB 293 (1984), where each Board member expressed a different view concerning when bargaining orders are appropriate.

In *John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983), *denying cert.*, 681 F.2d 11 (D.C. Cir. 1982), this Court denied *certiorari* in a bargaining order case. However, as the Honorable Judge Rehnquist stated in his dissenting opinion:

> "The Court spoke plainly in *Gissel*, however, emphasizing that in addition to finding that the employees' union preference would be better protected, before a bargaining order is issued it must be determined that 'the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies though present, is slight'..."
>
> "The so-called *Gissel* bargaining order was never intended to be used routinely. It is a remedy designed for cases where traditional remedies are insufficient. *Since in this case the bargaining order has been sanctioned without a finding that the special circumstances required by Gissel exist, we should determine whether this newly adopted approach is a proper one.*" 459 U.S. at 1181. [Emphasis added.]

The NLRB's and Second Circuit's Application of an Erroneous Standard

In our case, the NLRB's and Second Circuit's decisions are faulty because they are premised on the erroneous analysis that the crucial issue is how badly the employer acted and whether he should be rewarded or punished for his conduct.* In *Gissel*, this Court stated that the appropriate standard is whether a fair election can be conducted involving the current work force. Thus, by applying the wrong test, the Second Circuit and NLRB ignored the statutory rights of the new employees.

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*Even applying this standard, the NLRB and Court findings were wrong. (See discussion, *infra*.)

An employer is not obligated to recognize and bargain with a union merely upon a showing of authorization card majority or other evidence of majority short of a NLRB certification. An employer may refuse to bargain and wait until the union files for a NLRB-conducted secret ballot representation election. It need not respond in any fashion to a demand for recognition. *Linden Lumber Division, Sumner & Co. v. NLRB*, 419 U.S. 301, 310 (1974). However, a bargaining obligation may be imposed on an employer by means other than an NLRB conducted election. *Gissel, supra.*

If an employer, presented with a demand for recognition supported by actual majority support of unit employees, responds by committing exceptional, outrageous unfair labor practices of sufficient severity to have made a fair election impossible (category 1) or less pervasive cases which nevertheless make the holding of a fair election likely, the NLRB, in its discretion, may find as a remedy that the employer has waived its right to an election and must bargain with the union. *Gissel*, 395 U.S. at 610, 614.* *See, e.g., Trading Port, Inc.*, 219 NLRB 298, 300, 301 (1975). *But see, Gourmet Foods*, 270 NLRB 578 (1984). (NLRB lacks authority to issue a bargaining order in the absence of a majority.)

*The differences between the two categories have not fully been explained. In our case, the Second Circuit did not categorize the unfair labor practices except to call them "hallmark" violations. However, naming them does not explain why a fair election cannot be held in the current bargaining unit.

In certain cases, the NLRB and courts have held that violations such as threats of loss of employment and discharge of union adherents in violation of Section 8(a) (3) of the NLRA warranted the issuance of a bargaining order. However, also relevant is whether the unfair labor practices are pervasive—that is, extensive and effective throughout the entire voting unit rather than those unknown to a large group of employees in the unit.* *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2nd Cir. 1980). *Accord, Gissel*, 395 U.S. at 614; *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 944 (2d Cir.), *cert. denied* 439 U.S. 864 (1978). Simply calling a violation "hallmark" is not enough of a justification.** It is also especially important for the NLRB to carefully articulate its reasons for a bargaining order, where, as here, one Board member dissents. *NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100 (2d Cir. 1985).

The NLRB must include in its analysis of the propriety of issuing a bargaining order an examination of subsequent circumstances, such as a change in the employer's management, turnover in the work force and the passage of time. Indeed, as is relevant here, the rights of subsequently hired employees to make their own choice whether to be represented by a union must be considered. *NLRB v. Knogo Corp., supra*, 727 F.2d at 60; *NLRB v. Jamaica Towing,*

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*An unanswered question is whether this principle applies to the employees in the former work force or the new one which would vote if an election were directed when the NLRB issues its decision.

**The Second Circuit stated in *NLRB v. Pace Oldsmobile*.

> "Moreover, the Board's statement that substantial turnover does not militate against a bargaining order where the employer has engaged in 'hallmark violations' is wrong as a matter of law."

Inc., supra, 632 F.2d at 214.*

Application of the Foregoing Principles

It is undisputed that in our case, all three alleged discriminatees were offered and refused reinstatement prior to the NLRB hearing. The NLRB did not order reinstatement of these former employees. In addition, the record failed to establish (a) continuity of the work force; (b) prior, subsequent or other unlawful conduct; (c) that replacements were asked about their union sentiments; (d) that replacements expressed any interest in the union; or (e) that current employees have any knowledge of the union proceedings. These findings were observed by Chairman Dotson in our case and parallel the Second Circuit's findings in *NLRB v. Pace Oldsmobile, Inc., supra,* where a bargaining order remedy was denied enforcement. Nevertheless, in our case the NLRB majority imposed a bargaining order and the Second Circuit enforced the NLRB's order.

In light of the record concerning the current work force, it is evident that the NLRB and Second Circuit ignored *Gissel* and applied an inappropriate test when they concluded that a bargaining order remedy was appropriate. The Second Circuit and NLRB did not adequately explain the standard they applied and why any presumption created by the violation was not rebutted by the record. Neither the NLRB nor the Second Circuit discussed the different *Gissel* categories of unlawful conduct and what they mean. Nor did they provide a rational basis for issuing a bargaining order.

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*Compare controlling Second Circuit opinions with the following cases refusing to consider employee turnover: *NLRB v. Horizon Air Services,* 761 F.2d 22 (1st Cir. 1985); *NLRB v. Keystone Pretzel Bakery, Inc.,* 696 F.2d 257 (3rd Cir. 1982); *Justak Bros. & Co. v. NLRB,* 664 F.2d 1074 (7th Cir. 1981); *Leggs Products Inc.,* 619 F.2d 1337 (9th Cir. 1980). *But see, NLRB v. Western Drug,* 600 F.2d 1324 (9th Cir. 1979).

In our case, the NLRB and Court ignored the current work force when they imposed a bargaining remedy. They disregarded the lack of impact of the unlawful conduct on the new work force as fully explained by Chairman Dotson. The sole reference made to the new work force was the erroneous presumption that they knew of the past conduct. Beyond that, the Court did not discuss or even consider how mere knowledge would have an impact or would prevent the holding of a fair election. There is absolutely no explanation why a fair election cannot be held now in the new work force which was not employed when the violations occurred and which has never indicated any interest in union reprsentation. *See generally Gourmet Foods, supra.* In these circumstances, the NLRB and Second Circuit have not articulated a rational basis for imposing a bargaining order. Further, they have engaged in a flawed analysis of when to issue bargaining order remedies. Based on the foregoing, a Writ of Certiorari must be granted.

Beyond the foregoing, the consequences of employee turnover must be examined by this Court. In the first instance, the NLRB and Second Circuit do not agree on the effect of employee turnover in deciding bargaining order cases.* Nor do the various Courts of Appeal agree.**

Unlike our case, the Ninth Circuit has expressed a contrary view concerning extreme turnover. That Court has issued bargaining orders despite employee turnover. *See NLRB v. LB Foster Co.*, 418 F.2d 1 (9th Cir. 1969). However, in *NLRB v. Western Drug, supra,* the Ninth Circuit denied enforcement of a Board bargaining order where, as here, the three bargaining unit employees (who were not discharged) resigned prior to the NLRB hearing. Like our situation, the Company did not delay to take advantage of the

*See e.g., *NLRB v. Pace Oldsmobile, supra.*

**See Cases cited on page 13.

passage of time and the record did not establish that the employer would continue to violate the NLRA. Accordingly, a bargaining order remedy was not appropriate. This difference concerning an important legal principle must be decided by this Court.***

Finally, contrary to the Second Circuit's conclusion in our case, the former employees are not working now by their own choice. Even if they were unlawfully discharged, they were offered unconditional reinstatement which they voluntarily refused. Significantly, the NLRB's order does not provide for future reinstatement. In these circumstances, the Company's motive for offering reinstatement is irrelevant. The Second Circuit's rationale that "there was no meaningful offer of reinstatement" (see App., at p. A-11) applies another erroneous test. Whether or not the offers were made in good or bad faith, they were valid and unconditional. They were also refused. Had the offers not been valid, the NLRB would not have cut off the employees' back pay and would have ordered them reinstated. In light of these NLRB findings, it is apparent that no matter what the motive, the offers were valid. By refusing such offers, the employees terminated their employment by their own choice. The unfair labor practices did not cause the termination of their employment. The termination was of the employees'—and not the employer's—making.

Thus, our case is like *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), where this Court refused to issue a bargaining order because of employee turnover. There, as here, lawful termi-

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***Our situation unlike traditional turnover cases, involves offers of reinstatement which were made and refused shortly after the unlawful discharges and before the NLRB's hearing. Thus, there is no reason to believe that the Company delayed the proceeding in the hope of future turnover which would mitigate against the imposition of a bargaining order. Our case also involves unusual, abnormal and extreme, rather than common turnover. Indeed, our situation is wholly different from *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

nations were the cause of the employee turnover. Analogously, in our situation, the three former employees are not working by their own choice. In these circumstances, contrary to the Second Circuit's conclusion, the turnover was not caused by the unfair labor practice. Rather, it was caused by the employees' subsequent volutary termination of employment after they were offered reinstatement. This turnover has resulted in six new uninvolved employees who have shown no union interest. In these circumstances, to impose a bargaining order remedy would be to deny the new employees their statutory rights and to punish them and prevent them from making their own choice.

In sum the NLRB and Second Circuit did not sufficiently articulate or apply an appropriate standard or test to justify the imposition of a bargaining order remedy. Nor did they correctly consider the impact of the 100 percent employee turnover in the current bargaining unit. Finally, the record did not establish why a fair election cannot be held in the current all new unit. As a result, the imposition of a bargaining order remedy was an abuse of discretion by the NLRB. In light of the foregoing, and to resolve these issues and the conflict between and among the NLRB and the Courts of Appeal, it is necessary that this Court review the Second Circuit's opinion and current NLRB laws in this area.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Dated: Great Neck, New York
August 8, 1986

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 770—August Term, 1985

(Argued: January 27, 1986 Decided: May 30, 1986)

Docket No. 85-4157

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

ELI GORDON, GERALD TILLINGER and SEYMOUR TILLINGER, A COPARTNERSHIP d/b/a/ BALSAM VILLAGE MANAGEMENT COMPANY,

Respondents.

Before:

MESKILL, NEWMAN, and KEARSE,

Circuit Judges.

Petition by NLRB for enforcement of bargaining order entered on ground that employer had committed unfair labor practices, in violation of §§ 8(a)(1) and (3) of the

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), by threatening to discharge and discharging its three maintenance employees.

Board order enforced.

MARGARET BEZOU, Washington, D.C. (Rosemary M. Collyer, General Counsel, National Labor Relations Board, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Elinor Hadley Stillman, Michael David Fox, Attorneys, Washington, D.C., on the brief), *for Petitioner.*

LAWRENCE SOLOTOFF, Great Neck, New York (Joel Spivak, Solotoff & Spivak, Great Neck, New York, on the brief), *for Respondent.*

KEARSE, *Circuit Judge*:

Petitioner National Labor Relations Board (the "Board") seeks enforcement of its order issued on December 14, 1984, finding principally that respondents Eli Gordon, Gerald Tillinger, Seymour Tillinger, and their partnership, Balsam Village Management Company (collectively the "Company"), had committed unfair

labor practices in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. §§ 158(a)(1) and (3) (1982), by threatening to discharge and discharging three Company employees for their pursuit of union membership. The Board order required the Company principally to cease and desist from interfering with its employees' statutory rights and to bargain with Local 32B-32J, Service Employees International Union, AFL-CIO (the "Union"), as the bargaining representative of its employees in an appropriate unit. In opposition to the petition for enforcement, the Company contends principally that the Board's finding that it engaged in unfair labor practices should be overturned and that, in light of 100% employee turnover in the bargaining unit, a bargaining order is inappropriate. We reject both contentions and grant the petition for enforcement.

I. BACKGROUND

Prior to February 1983, the Company employed a three-person maintenance crew, consisting of Carlos Casal, Mario Aguila, and Daniel Santos, for the care of a 45-building apartment complex operated by the Company. Each of the three had been employed by the Company for a number of years without any substantial complaint as to their performance. According to the testimony of these employees, which was expressly credited by the Board's Administrative Law Judge ("ALJ"), the following events occurred in early 1983.

A. *The Events*

In January 1983, Casal, Aguila, and Santos joined the Union and signed cards authorizing the Union to repre-

sent them in collective bargaining. The Union mailed receipts for the employees' initiation fees to Casal at the Company's office, mistakenly believing this to be Casal's home address. The receipts, in an envelope showing the Union's name and return address and bearing the words "ENCLOSE YOUR UNION BOOK! DO NOT SEND CASH" in capital letters, arrived at the Company's office not later than January 27 or 28, when Casal saw the envelope on Gerald Tillinger's desk.

The envelope was not given to Casal until Wednesday, February 2. On February 4, Casal was summoned to a meeting with Gerald Tillinger and Gordon and was told that the Company could not afford unions. Casal was instructed to try to persuade Aguila and Santos to leave the Union. When Casal replied that Aguila and Santos would not renounce the Union, Gordon instructed him to tell them that unless they renounced the Union "they will lose their jobs. They have families to support and I'm sure they don't want to lose their jobs. . . . [E]xplain to them that there will be no job if they join the Union." Gordon also told Casal that if Casal did not cooperate and get them out of the Union, the Company would have to "accept" Casal's "resignation."

Casal conveyed Gordon's message to Aguila and Santos, both of whom told Casal they would remain in the Union. When Casal relayed this response to Gordon and added that he too would remain in the Union, Gordon told Casal, "if you're going to stick to the union, . . . then I accept your resignation also." He continued to urge Casal to renounce the Union himself and to persuade the other two to renounce it also. Later that afternoon, when Aguila and Santos went to the Company office to

because of their union membership. He found that the Company had violated §§ 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. He recommended that the Company be ordered (1) to make the discharged employees whole, (2) to cease and desist from interfering with employees' exercise of their statutory rights, and (3) to bargain with the Union upon request.

In a Decision and Order dated December 14, 1984 ("Board Decision"), the Board unanimously agreed with the ALJ that the Company had violated §§ 8(a)(1) and (3) of the Act and adopted the ALJ's first two recommendations. With one member dissenting, the Board concluded that these violations warranted the issuance of a "*Gissel*" order, *see NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), requiring the Company to bargain with the Union. The Company was ordered principally to cease interfering with employees' exercise of their statutory rights, and to bargain with the Union. The Board petitions for enforcement of this order.

II. DISCUSSION

In opposition to the Board's petition for enforcement of its order, the Company contends principally (1) that the finding that the Company unlawfully threatened or discharged the three workers was unwarranted, and (2) that a bargaining order was improper. We find no merit in either contention, and we enforce the order.

The Company's challenge to the findings that it engaged in unfair labor practices by threatening to discharge and discharging Casal, Aguila, and Santos because of their adherence to the Union need not detain us long.

pick up their pay checks, they were discharged—told by Gordon that their jobs were being eliminated.

The Company's version of these events, presented principally by Gordon, was that Gordon told Casal that Aguila and Santos would be discharged because the Company did not need employees to do cleaning, and that because of this, Casal resigned. Gerald Tillinger, who, according to both sides, was present during the pertinent events, did not testify. The ALJ found Gordon to be "a poor quality witness."

On February 8, the discharged employees began picketing the Company's premises. On February 25, Gordon approached them on the sidewalk and told them that they could return to their jobs if they renounced the Union. They continued to picket until mid-April. In the meantime, the Union sent the Company a request to meet and bargain; the Company did not respond. The Company proceeded to hire six persons to perform the work of the discharged employees. One was hired in February, two in early April, and the others in June and August. None of the replacements was a union member.

On June 8, the Company offered reinstatement to Casal, Aguila, and Santos. All declined.

B. *The Board's Order*

Unfair labor practice charges were filed by the Union, and a complaint was issued by the Board's Acting Regional Director. Following a hearing, the ALJ found the facts as set forth above and concluded that the Company had violated §§ 8(a)(1) and (3) of the Act by threatening to discharge the three employees unless they renounced their support for the Union and by discharging them

The Board's findings that an employer has committed unfair labor practices in violation of the Act are entitled to affirmance on review if they are reasonable and supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99, 100 (2d Cir. 1982) (per curiam) ("*Pace I*"). When its findings are based on the ALJ's assessment of the credibility of the witnesses, they will not be "overturned unless they are 'hopelessly incredible' or they 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.' " *NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 96 (2d Cir. 1985) (quoting *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983)).

In the present case, the employees testified to the events as described in Part I above. Their testimony, which was supported by the timing and sequence of events not in substantial dispute, was neither inherently incredible nor disputed by any documentary evidence, and it was expressly credited by the ALJ. The contrary testimony by Gordon, discredited by the ALJ, and the Company's office manager was insufficient to require the ALJ to disbelieve the versions of the events testified to by Casals, Aguila, and Santos. In light of all the testimony, there was plainly substantial evidence in the record to support the Board's findings that the Company threatened to and did discharge its three maintenance employees on account of their union membership.

The Company argues that a bargaining order is nonetheless inappropriate principally on the grounds that (1) the Board did not adequately articulate its basis for issuing a *Gissel* bargaining order, and (2) there has been

100% turnover in the maintenance staff, with none of the new employees having expressed an interest in the Union, and that this turnover was caused by the discharged employees' rejection of the Company's offers of reinstatement. These arguments have no merit.

Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, the Board has discretion to order an employer to bargain with a union not theretofore recognized by the employer if the Board reasonably concludes that serious unfair labor practices by the employer have made it unlikely that a representation election can be conducted free of the taint of those practices. Because a *Gissel*-type bargaining order may impose on the employees a union they have not actually chosen to represent them, we require that such an order be entered " '[o]nly where there is a substantial danger that employees will be inhibited by the employer's conduct from adhering to the union,' " *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2d Cir. 1984) ("*Pace II*") (quoting *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 154 (2d Cir. 1981)), and " 'only when the Board demonstrates that an election is unlikely to reflect the uncoerced preference of the bargaining unit,' " *Pace II*, 739 F.2d at 110 (quoting *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983)). Fundamental intrusions into employee rights—" 'hallmark' violations"—"will support the issuance of a bargaining order unless some significant mitigating circumstance exists." *NLRB v. Jamaica Towing Inc.*, 632 F.2d 208, 212 (2d Cir. 1980). Threats of discharge of union adherents are hallmark violations, *id.* at 212-13; employee turnover may be a mitigating circumstance, *NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 867 (2d Cir. 1984).

Further, we have refused to enforce *Gissel* bargaining orders in cases where the Board has not set forth findings

and analysis that support the imposition of such an order. *See, e.g., Pace II*, 739 F.2d at 110-12; *NLRB v. Heads & Threads Co.*, 724 F.2d 282, 289 (2d Cir. 1983); *Pace I*, 681 F.2d at 101-02. We consider it sufficient, however, if the ALJ has provided such findings and analysis and the Board has indicated its adoption of them. *See NLRB v. Windsor Industries, Inc.*, 730 F.2d at 866; *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 24 n.1 (1st Cir. 1985); *Kenworth Trucks of Philadelphia, Inc. v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978). All of the requirements for enforcement of a *Gissel* order have been met here.

The rationale for the present order was spelled out in the Board's decision principally in its adoption of the ALJ's decision. The ALJ noted, *inter alia*, that at no time had the Company challenged the status or authority of the Union to represent the employees, that it had deliberately flouted the Act for the express purpose of avoiding its statutory bargaining obligation, and that its actions had a continuing "restraintful [*sic*] and coercive" effect after the discharge of the old employees and the hiring of the new. The Board adopted the ALJ's findings and reasoning, elaborating as follows:

> For the reasons the judge stated, we agree that a *Gissel* bargaining order is clearly warranted to remedy the Respondent's unfair labor practices, which the judge aptly described as the "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation." We also agree with the judge's rejection of the Respondent's argument that a bargaining order should be denied because all three discriminatees declined reinstatement, and thus there has been substantial "employee turnover." As the

> judge pointed out, the Respondent's contention has "a hollow ring" because the "employee turnover" in this case was a direct and obvious product of the Respondent's own unlawful conduct.

Board Decision at 1-2 (footnotes omitted). This sufficed to explicate the Board's decision to issue a *Gissel* bargaining order.

We find no abuse of discretion in the conclusions of the Board and the ALJ that such an order was appropriate. The Company's threats to discharge Aguila and Santos if they did not repudiate the Union, its threat to discharge Casal if he did not persuade them to do so and did not renounce the Union himself, and its discharge of the men upon their refusals, were plainly "hallmark" violations. The fact that the Company's maintenance work force has had a 100% turnover is not, in the circumstances of this case, a mitigating factor. First, the fact that there has been such turnover does not necessarily mean that a fair election could now be held. Three of the six new employees were hired while the discharged employees were picketing the Company. The new employees presumably are thus aware of the employer's past treatment of its employees who chose to be represented by a union, and the Board was well within the bounds of discretion to view that history as making the likelihood of an untainted election remote.

More important, the 100% turnover here is not a factor that mitigates against a bargaining order because the turnover was caused by the very unfair labor practices sought to be remedied. It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has

resulted from the employer's unlawful discharge of all of the members of the bargaining unit.

Finally, we reject the Company's contention that responsibility for the 100% turnover should be placed on the discharged employees and not on the Company on the premise the employees were offered, and declined, reinstatement. There was no meaningful offer of reinstatement here. Gordon's first "offer" to the discharged employees was conditioned upon their renunciation of the Union. It plainly could not alleviate the unlawfulness of the discharge, which was likewise bottomed on the employees' refusal to renounce the Union. The June 1983 offers of reinstatement, made more than four months after the employees were discharged, were so belated that the Board was justified in not construing them as a good faith attempt to rehire these men. The Company knew the men had families to support; it had cited this fact in initially threatening discharge. It was reasonable to expect that they could not wait four months before seeking alternative employment. Further, by the time these offers were made, the Company had already hired three persons to replace the three discharged employees. Accordingly, the purported offers of reinstatement did not constitute a mitigating circumstance sufficient to prevent issuance of a bargaining order.

We have considered all of respondents' arguments in opposition to the petition for enforcement and have found them to be without merit.

CONCLUSION

The Board's order of December 14, 1984, is in all respects enforced.

DZDe

273 NLRB No. 66

D—2467
New York, NY

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ELI GORDEN, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP, d/b/a BALSAM VILLAGE MANAGEMENT COMPANY

and

Case 29—CA-10276

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On October 17 1983 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the

judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

For the reasons the judge stated, we agree that a *Gissel*[2] bargaining order is clearly warranted to remedy the Respondent's unfair labor practices, which the judge aptly described as the "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation."[3] We also agree with the judge's rejection of the Respondent's argument that a bargaining order should be denied because all three discriminatees declined reinstatement, and thus there has been substantial "employee turnover." As the judge pointed out, the Respondent's contention has "a hollow ring" because the "employee turnover" in this case was a direct and obvious product of the Respondent's own unlawful conduct.

Our dissenting colleague claims that a bargaining order is inconsistent with decisions of the Second Circuit. We disagree. In its *Jamaica Towing* opinion,[4] the court specifically cautioned against "rewarding an employer for his own misconduct," and limited consideration of the turnover factor to "cases where later relevant events are not of the

[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2]*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3]We find it unnecessary to pass on the judge's alternative rationale for issuing a bargaining order.

[4]*NLRB v. Jamaica Towing*, 632 F.2d 208, 214 (2d Cir. 1980).

employer's making." Here, the "employee turnover" was "of the employer's making," and withholding a bargaining order on that ground would be "rewarding an employer for his own misconduct." Accordingly, for all of the above reasons, we adopt the judge's recommendation that a *Gissel* bargaining order be issued.[5]

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[5]Chairman Dotson finds the issuance of a bargaining order in this case arising in the Second Circuit to be contrary to the law of that circuit. See *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984); *NLRB v. Windsor Industries*, 730 F.2d 860 (2d Cir. 1984); *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), and cases cited therein. While recognizing the severity of the Respondent's misconduct, Chairman Dotson finds that a bargaining order would impair the rights of the Respondent's current work force. In so finding he notes that the unlawfully discharged employees declined reinstatement to their former jobs. Thus, there is no continuity in the Company's work force before and after the unfair labor practices. Further, the record fails to show that the Respondent asked the replacement employees about their union sentiments, that the replacement employees exhibited any interest in the Union, or that the Union attempted to organize the new employees. No showing was made that the current employees discussed the Respondent's prior misconduct or that the Respondent has engaged in further antiunion activity. In view of the circumstances of this Second Circuit case, Chairman Dotson finds a bargaining order inappropriate.

D—2467

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Copartnership, d/b/a Balsam Village Management Company, New York, New York, its partners, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 14 December 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-412-83
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

ELI GORDON, GERALD TILLINGER
AND SEYMOUR TILLINGER, A
COPARTNERSHIP, d/b/a BALSAM
VILLAGE MANAGEMENT COMPANY,

Respondent,

and

Case No. 29-CA-10276

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Charging Party.

Meredith A. Fisher, Esq.,
Brooklyn, N.Y., for NLRB
General Counsel.
Joel Spivak, Esq. (Messrs. Solotoff & Spivak, Attorneys),
Great Neck, N.Y., for Respondent.
Michael Geffner, Esq. (Messrs. Israelson, Manning & Raab), New York, N.Y., for
Charging Party.

JD-412-83

DECISION

I. Preliminary Statement; Issues

OHLBAUM, Judge:—This proceeding 1/ under the National Labor Relations Act as amended, 29 U.S.C. 151 *et seq.* ("Act"), was litigated before me in Brooklyn, New York, on August 15 and 17, 1983, with all parties participating throughout by counsel afforded full opportunity to present evidence, arguments, and briefs (received on October 7, 1983). All have been carefully considered.

The basic issues presented are whether Respondent violated Section 8(a) (1), (3), and (5) of the Act by threatening employees with discharge and other reprisals for joining or supporting the Charging Party Union, by discharging (and, for a time, refusing to agree to reinstate) three employees for joining the Union and engaging in concerted activities protected under the Act, and by refusing to recognize and bargain with the Union as the authorized collective bargaining representative of Respondent's employees. Respondent denies all of these allegations.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

1/ Based upon complaint issued April 5, 1983, by the Acting Regional Director for NLRB Region 29, growing out of charge filed on February 18, 1983, by the above Union.

FINDINGS AND CONCLUSIONS

II. Parties; Jurisdiction

At all material times, Respondent, a copartnership consisting of Eli Gordon, Gerald Tillinger and Seymour Tillinger doing business under the firm name and style of Balsam Village Management Company, has continuously engaged and now engages in the management, operation and rental of a garden apartment complex known as Balsam Village, at 88-15 133d Avenue, Borough and County of Queens, City and State of New York, at which address Respondent has also maintained and maintains its principal office and place of business. During the representative year immediately preceding issuance of the complaint, Respondent derived gross revenues exceeding $500,000 in and from those business operations; and, further therein, caused to be transported to and received at its said premises for its use in said business, goods and materials valued at over $5,000, purchased from other enterprises in New York who in turn had purchased and received them directly in interstate commerce from and through other states.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times Charging Party Union has been and is a labor organization as defined in Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. **Facts as Found**

Respondent operates and manages an apartment house complex in Queens County, New York, covering some 7 city blocks, consisting of 270 apartment units located in 45 6-family buildings. Prior to events to be described, upkeep, maintenance and cleanup of the grounds, walks, and portions of the buildings used in common (hallways, stairs, doors, cellars, furnaces, etc.), as well as minor repairs (e.g., minor plumbing), were done by three employees who figure prominently in the events to be described. These were Carlos Casal, the "superintendent" (but not a supervisor within the Act's definition, since he lacked authority over and had no subordinates, and possessed no other characteristic of supervisorship listed in the Act) who tended some 118 boilers and water heaters and also made minor repairs within his capability; and Mario Aguila and Daniel Santos, who took care of the ground (mowing lawns, keeping grass and walkways debris-free, etc.) and general cleanup chores (hallways, stairways and rails, hall ceilings, windows, doors, mailboxes, vacuuming and waxing floors, laundry rooms, parking lots, project office, etc.). Major refurbishing was accomplished by outside contractors, including firms of the Tillinger brothers or Eli Gordon, the partners comprising Respondent partnership. 2/ Until around the summer of 1982, Mattie Tillinger, wife of Respondent partner Seymour Tillinger, was in overall charge and management of the housing project. When she (Mrs. Seymour Tillinger) ceased functioning in that

2/ Some painting was occasionally done by one or the other of the foregoing three employees, on their own time, for extra or separate pay.

capacity, Respondent partner Eli Gordon commenced overseeing the project until Respondent partner Gerald ("Jerry") Tillinger assumed that responsibility on a full-time basis in October 1982 (with Gordon continuing to participate on a part-time basis). The project office bookkeeping, correspondence, and related chores were handled by office manager/secretary Helen Lober in an office she shared with Jerry Tillinger (and Gordon). Respondent partner Seymour Tillinger has not taken an active part in Respondent's operations at the times here involved.

Because of dissatisfaction with the terms and conditions of their employment (including a cutback in medical insurance for dependents), in early December 1982 interest in the possibility of joining a union to bargain collectively, developed among these three employees, who (except for an occasional student here and there utilized occasionally and sporadically to assist with a chore), a part-time night watchman/guard, and the office manager/secretary), comprised the entire workforce at the project. It was stipulated at the outset of the hearing that these three employees constituted the only employees in the bargaining unit alleged in the complaint, a conventional bargaining unit which I find appropriate for collective bargaining under the Act (and so admitted at the trial by amendment to the answer).

After meeting with a business agent (Anthony Poccio) of the Charging Party Union in January, 1983 and, after discussion with him being satisfied to proceed along that line, Respondent's three employees joined the Union (paying the required initiation fees) and on January 20 (1983) signed cards (the meaning and significance of which they each clearly

understood) authorizing the Union to represent them in collective bargaining. On January 25 or 26 the Union mailed receipts for these initiation fees to Casal *at the project* (in the mistaken belief that he lived there), although Casal lived off the project premises. That mail, in a window envelope showing the name of return address of the Union, and bearing the capitalized words "ENCLOSE YOUR UNION BOOK! DO NOT SEND CASH!," thus arrived at the *project office*, where it landed up on the desk of Project Manager Jerry Tillinger, where it was observed by Casal on January 27 or 28 (Thursday or Friday). The envelope, perhaps opened 3/, was handed to Casal by office manager Lober on February 2 (Wednesday).

When the three employees discussed the *pros* and *cons* of union affiliation with Union business agent Poccio, the latter specifically warned them that "joining the Union could mean losing [your] jobs if the Employer [is] not in agreement with it." Unfortunately, this prediction of Poccio was precisely and rapidly fulfilled. On February 4 (Friday) payday, two days after the Union envelope with the Union initiation fee receipts of Casal and his two fellow-employees was handed to Casal by Lober, the three employees were summarily discharged.

Casal as well as Aguila had been in Respondent's employ uninterruptedly for some 6 years, since 1977; and Santos from 1980, with an hiatus from late 1980 to mid-1982 followed by rehire and continuous employment since then. As testified by

3/ Casal could not recollect one way or the other, since, as he testified, he was considerably unnerved by the incident—*i.e.*, delivery of the envelope bearing the Union name, address[ed] to him, at the project office, clearly disclosing connection with the Union.

these three individuals, whom I credit based upon my close observation of their testimonial demeanor, no dissatisfaction had been expressed by management with the work of any of them. 4/ At no time has Respondent furnished any of these employees with any writing stating any reason or basis for his discharge, and unemployment insurance benefits 5/ to them were applied for and paid without objection or protest from Respondent.

The circumstances of the actual discharges were as follows. In the early afternoon of February 4 (Friday), office manager Lober summoned Casal to the project office, where he was met by project manager Jerry Tillinger and his partner Gordon. Gordon opened up at Casal with, "This is not Manhattan. We cannot afford Unions here, and [you all] should have came and talked to me about this before you done anything about it. ***We cannot afford Unions and you should talk the [the other two] men out of getting into Union... [We need your] cooperation for all of us to work together to try to bring the place back into shape and the Union will not let us do that. ***[G]o and talk to them [i.e.,

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4/ Some alleged correspondence from a very few alleged tenants out of the very large number of tenants, produced by Respondent, details certain alleged complaints to management. These, however (including nonreceipt of a copy of the lease, and various structural or outside repairs desired), from but few of the very large number of tenants in the project and constituting seemingly the usual kind of complaints from tenants, either obviously fall outside the scope of the duties or competence of the three employees or have not been shown to be ascribable in any way to any neglect, misfeasance, or nonfeasance on their part; nor is there any showing that any of these alleged conditions was ever reported or assigned to any of those employees for rectification, nor, if it was, that it was not taken care of.

5/ As is well known, such benefits are not payable in case of discharge for cause ascribable to the employee.

his two fellow-employees] and talk them out of the Union... if [you all] bring the Union [I'm] going to have to fire them and [I'm] going to have to accept your resignation...." When Casal explained to Gordon and Tillinger that "it's too late, the men want the Union. We have talked about it," Gordon persisted, "Well just go and talk to them, just tell them that they will lose their jobs. They have families to support and I'm sure they don't want to lose their jobs. Just go and talk to them and explain to them that there will be no job if they join the Union." Gordon also told Casal, "You have to decide whether you guys want to work here or you guys don't want to work here ... unions are no good for the company ... once you have a union you cannot work as a family any more ... if the men don't want to give up the union, then they don't have a job. ****if [you don't] cooperate and get them out of the union, [we will] have to accept [your] resignation. ****You have a family also... and [you have] to think about [your] family." Casal thereupon conveyed the foregoing to Aguila and Santos and told them that "you have to make a decision if you want the Union or not because he's firing you if you want the Union." Both Aguila and Santos indicated that they "wanted" and were "sticking with the Union." Casal returned to the project office and relayed this decision to Gordon and Tillinger, adding that "I'm sticking with the union with the men." Gordon then urged Casal to "come off the union [yourself] and [I'll] straighten it out with the men." When Casal reiterated, "no, I'm sticking with the union with the men," Gordon responded, "well, if you're going to stick to the union, ...then I accept your resignation also." At no time did Casal accept the invitation to "resign." Gordon proceeded to remonstrate with Casal again, urging anew that they give up the Union, this time adding, "You [Casal] know that you are

the key for them to be in the Union. You know that if you don't join the Union they have no chance. They don't speak English. They will never be able to do anything, but you are the key." Gordon concluded by inviting Casal and his wife to join him for dinner that evening "and then we will all be a happy family again." As for Aguila and Santos, Gordon said, "they are finished. [I] cannot keep them any longer." And, when they came for their pay later in the afternoon, Gordon did indeed abruptly terminate them, stating that their jobs were "not going to be performed any longer ...[We] are not in the business to clean hallways. ...[We are] doing a rental business and things [are] not doing well and besides... [you] don't speak English and we cannot use you for anything else. If you spoke English maybe we could try to put you doing something else."

Following the discharge of these three employees on February 4, the Union on February 7 formally requested to meet and bargain with Respondent (*GC Exh. 2*), a request received by Respondent on February 10 but to which Respondent has at no time responded. On February 8, continuing until mid-April, the three discharged employees picketed Respondent's premises. During the course of this picketing, replacement employees were observed to be doing the work they had formerly done. 6/ Also during the course of this picketing, on February 25 Gordon approached the pickets and informed them that if they renounced the Union they could return to their jobs—a condition not accepted by the employees, who continued their picketing.

6/ Confirmed by Respondent's own personnel records, as testified to by Respondent's office manager Lober. Gordon also conceded that after the discharge of Aguila and Santos, their work continued to be done by other employees hired to replace them; and that of the six hired, none was a union member.

It was stipulated at the trial that on June 8, 1983 Respondent offered the three employees here reinstatement, which they declined.

* * * *

It is evident from the foregoing facts as found that General Counsel has established a clear *prima facie* case of inhibitory, restraintful, coercive, discriminatory and retaliatory discharge of the three employees in question, in violation of Section 8(a)(1) and (3) of the Act. The three had been satisfactory employees for a long time but were precipitately fired right after they joined the Union and Respondent learned about it. Respondent's knowledge is clear not only from its receipt of the unfortunately misdirected Union envelope containing the receipts for the three employees' initiation fees, but also, of course, from Gordon's remarks to Casal, detailed above, importuning Casal to persuade his fellows to drop out of the Union, on penalty of being discharged.

General Counsel having established a *prima facie* case, the burden shifts to Respondent to establish by a preponderance of evidence that the discharges in question were not for reasons violative of the Act. *See N.L.R.B. v. Transportation Management Corp.*, U.S., 113 LRRM 2857 (June 15, 1983). It is accordingly necessary to address Respondent's defenses.

B. **Respondent's "Defenses"**

Respondent advances several contentions by way of defense. Each is readily and simply answered.

To begin with, Respondent contends that it no longer had need for the discharged employees' services. This is belied by the fact that no previous mention had been made to that effect, prior to their advent into unionism; by the nature of Respondent's business, which had not changed and which clearly continued to require such services; by Respondent's prompt hire of replacements for the discharged employees; and by Respondent's offer of reinstatement to the discharged employees.

Respondent next contends that it discharged Aguila and Santos because they could not speak English. The answers to this are that Respondent was aware of this when it hired them; that they remained in Respondent's employ for years without complaint or incident on that (or other) score; that knowledge of English was not required in the work they did, and ignorance of English in no way affected their job performance; and that they could and did carry on two-way conversations with project manager Tillinger in Spanish, which he spoke and understood.

Respondent further contends that Casal resigned his job voluntarily. This is simply untrue. Upon comparative testimonial demeanor evaluation, without more (as well as on the plain inherent probabilities of the situation under the circumstances described), I clearly prefer and accept the version of Casal (a most impressive witness) over that of Gordon (a poor quality witness, as the record also will disclose) as to the statements, circumstances and events surrounding the employees' discharges on February 4.

Respondent also contends that the employees were dis-

charged for inefficiency or inability to do the needed work. This also is belied by their long-term employments, during which Respondent had expressed no dissatisfaction with their work. 7/

As for other "defenses" darkly hinted at in Respondent's opening statement, suffice it to say that they did not emerge from that darkness at the trial, and that they therefore continue to be invisible and not deserving of mention, much less credit. Perhaps it is fair, however, to regard them as reflective of the fictive or pretextual nature of the other "reasons" contrived to attempt to justify the discharges of under the circumstances shown.

Finally, it is to be observed that Jerry Tillinger, although deeply implicated in events that have been described, elected without explanation not to testify.

* * * *

Under these circumstances, Respondent having failed by a preponderance of the evidence to overcome General Counsel's *prima facie* case (*Transportation Management, supra*), it is found that Respondent threatened to and then discharged the three employees in question on February 4, 1983 because of their Union membership and their desire to bargain collectively, rights guaranteed to them under Section 7 of the Act; that but for such Union membership and their

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7/ I have already commented on the insignificant, irrelevant, or inconclusive nature of the few paltry "complaints" of a small number of tenants, many if not most of which related to matters not within these employees' duties or competence, and as to which there was no proof that they were communicated to these employees for their action, nor that they were not attended to by them. *Supra* n. 4.

exercise of such rights they would not have been discharged, and that Respondent thereby violated and continues to violate Section 8(a)(1) and (3) of the Act; and, further, that by failing and refusing to bargain with Charging Party Union as the duly authorized collective bargaining representative of an appropriate bargaining unit of Respondent's employees, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings and the entire record, I state the following:

IV. Conclusions of Law

A. Jurisdiction is properly asserted here.

B. By threatening to discharge and by discharging its employees Carlos Casal, Mario Aguila, and Daniel Santos, at the times and under the circumstances described and found in "III," *supra,* Respondent has discriminated in regard to the hire, tenure, and terms and conditions of employment of its employees, and has, further, interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7, thereby violating Section 8(a)(3) and (1), of the Act.

C. By failing and refusing to recognize and bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, as the duly designated bargaining representative of all of Respondent's employees in the following appropriate collective bargaining unit, under the circumstances described and found in "III," *supra,* Respondent has violated Section 8(a) (5) and (1) of the Act:—

All building service employees, including porters, handymen and superintendents employed by Respondent at its Queens facility, exclusive of all office clerical employees, guards, and all supervisors as defined in Section 2(11) of the Act.

D. The aforesaid unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

V. Remedy

Respondent having been found to have discharged employees, after threatening to do so, and to have interfered with, restrained and coerced them in the exercise of their Section 7 rights, in violation of Section 8(a)(3) and (1) of the Act, should, as is usual in cases of that variety, be ordered to cease and desist from continuing or other such violations and to make each of the employees whole through payment of backpay and interest computed as explicated by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). In this connection it is to be noted that the parties have stipulated that the three discharged employees here were offered, but declined, reinstatement on June 8, 1983, and that with regard to the calculation of backpay General Counsel seeks no more for the three by way of recompense than the backpay due them until then. Respondent should also, as usual, be required to expunge any relevant deleterious references to these employees from its records; to preserve and open its books

and records to the Board's agents for computation and compliance determination purposes; and to post the conventional informational Notice to Employees.

There arises the additional question of whether, as General Counsel demands, a bargaining order should be issued in this case. In this connection it is to be noted that, at the time of their unlawful discharge as well as at the time of the Union's demand for recognition and collective bargaining, the three employees here constituted the entire, that is to say 100% of, the bargaining unit. It is further to be noted that at no time was the status of the Union as such bargaining agent in any way challenged or questioned by Respondent—indeed, to the contrary, Respondent insisted that the three employees and Union members relinquish their Union membership as a condition to being permitted to remain in Respondent's employ; and when they refused to do so they were for that reason promptly discharged. Employees who are discharged in violation of the Act remain employees within the Act's definition (Section 2[3]). Since the three unlawfully discharged employees were thus employees, as well as the only members of the bargaining unit, when Respondent received the Union's demand to bargain, the Union represented all of the employees in the bargaining unit at that time. In no way did Respondent challenge or raise any question concerning the Union's authority as bargaining representative, and at no time did Respondent request an election. The Act does not *require* an election as a precondition to Union recognition. An employer who doubts a Union's representative status without an election should in some way so indicate. But here there was no doubt in Respondent's mind regarding the Union's status and authority. After a direct confrontation,

the employees expressly refused to abandon the Union, when Respondent demanded that they do so as the cost of retaining their jobs. What better proof of their Union desires (or of Respondent's knowledge thereof) was required? Thus, there was no question in Respondent's mind of the Union's status as the duly designated bargaining representative of *all* of the unit employees at the time the Union sought to bargain on their behalf. The fact that, on top of its discharge of these employees for joining the Union and seeking to bargain collectively, Respondent later replaced them with a new and larger crew, does not change this. We have been long and consistently been instructed by the Supreme Court that mere turnover—even, unlike here, where wholly legitimate—does not oust a union as bargaining representative. *See NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *NLRB v. Katz*, 369 U.S. 736, 748 n. 16 (1962); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969). And, of course, an employer cannot disestablish a bargaining unit or avoid his obligation to bargain by simply unlawfully discharging all of the unit members—this is so plain that it requires no citation of authority. Even if, after the bargaining obligation was perfected, the three employees here had left of their own accord and had been replaced by non-Union employees, the existing bargaining obligation would not thereby have been erased. *Gissel* and other cases cited *supra*. It is no different just because the three here subsequently declined reinstatement, for reasons good and sufficient to them, such as disinclination to give up other jobs they had since obtained. An employer cannot be permitted (as Respondent here attempted to do) to disestablish a bargaining unit through the simple expedient of discharging all of its members. Such a result would constitute an

intolerable affront to the basic purposes of the Act. And since the effects of Respondent's actions remain restraintful and coercive, they continue to require remediation so that deliberate flouting of core purposes of the Act not be encouraged by being suffered to go unremedied. 8/

Respondent's refusal to recognize and bargain with the Union as the bargaining representative of all of its unit employees, without raising any question as to the Union's status or demanding an election, constituted a violation of Section 8(a)(5), as found above. In this situation, resort to *Gissel* to support an electionless bargaining order is unnecessary, for to withhold a bargaining order in this situation would leave the Section 8(a) (5) violation wholly unremedied. 9/ However, even under *Gissel* a bargaining order would be appropriate under the circumstances shown—*i.e.*, unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation. In *Gissel, supra,* the Supreme Court described the conditions where an electionless bargaining order is appropriate under the Act. The instant case fits comfortably within the Court's instructions there. I find that Respondent's described unlawful actions in discharging the three employees, comprising the entire bargaining unit, for attempting to exercise the statutorily guaranteed right to bargain collectively, was deliberate, egregious and pervasive, thrusting at the heart of the Act's purposes and guarantees;

8/ For this reason (in addition to the Section 8[a] [5] violation described above), it matters not that the three unlawfully discharged employees do not desire reinstatement, since if no effective remedy is provided Respondent will have succeeded in its deliberate flouting of the Act.

9/ Neither a bargaining demand (or petition) nor a Section 8(a) (5) violation is a prerequisite for a *Gissel* electionless bargaining order. *Gissel, supra* at 610 and 614.

that it had and will "have the tendency to undermine majority strength and impede the election processes" (*Gissel, supra* at 614); that it was and continues to be of " 'such a nature that [its] coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had' " (*id.* at 614); that, under the circumstances described and found, "the possibility of erasing the effects of [Respondent's] past practice and of ensuring a fair election ... by the use of traditional remedies ... is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (*id.* at 614-15); and that there is "insufficient indication that an election ... would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practice occurred" (*id.* at 616). 10/

An employer who discharges the entire bargaining unit because its members have designated a union to bargain collectively for them, is hardly in a position to complain if required to bargain with the union without that fair election which it set out deliberately to abort by riding roughshod over its employees' rights and the law's requirements. 11/ Respondent's current tongue-in-cheek protestation against an electionless ("*Gissel*") bargaining order on the ground that it would deprive its present employees of the "free choice" of bargaining representative has a hollow ring, since it was

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10/ *See also Amsterdam Wrecking & Salvage Co., Inc.*, 196 N.L.R.B. 113 (1972), *enforced*, 472 F.2d 153 (2d Cir. 1973); *Medley Distilling Company*, 187 N.L.R.B. 84 (1970), *enforced*, 453 F.2d 374 (6th Cir. 1971); *Gibson Products Company*, 185 N.L.R.B. 362 (1970).

11/ As has been pointed out, discriminatory discharge "goes to the very heart of the Act" (*A.J. Krajewski Mfg. Co.*, 180 N.L.R.B. 1071; 1970) and is the "surest method of undermining a union's majority of impeding an election process" (*NLRB v. Sitton Tank Company*, 467 F.2d 1371, 1372 [8th Cir. 1972]); and, accordingly, a bargaining order is upon that basis alone warranted.

Respondent itself who, by discharging all of its union employees, attempted to deprive them of that free choice through an uncoerced and fair election without unlawful interference on its part. Respondent's current argument, purportedly "seek[ing] to vindicate the rights of his employees" (*Brooks v. NLRB*, 348 U.S. 96, 103 [1954]; *see also ILGWU* [*Garwin Corporation*] *v. NLRB*, 374 F.2d 295, 308 [D.C. Cir. 1967], *cert. denied*, 387 U.S. 942 [1967) who themselves seek no such "vindication," would be more appealing if Respondent had not deliberately terminated its union employees and replaced them with nonunion employees, thereby deranging the statutory election system by putting a heavy hand on the election scales. Respondent has changed the electorate to one of its own design. Its position is thus at odds with the principles enunciated by the Supreme Court 14 years ago in *Gissel*. Respondent's contention that it should no longer be required to bargain since, as a result of its unlawful discharge of the three employees here, it no longer employs any union personnel, smacks like that of the orphan who, convicted of murdering his parents, pleaded for mercy on the ground that he was a poor orphan. *See Franks Bros. Co., supra* at 704.

Accordingly, upon *Gissel* principles as well as because of Respondent's flat-out violation of Section 8(a) (5), a bargaining order is warranted and required here, and should be issued.

In view of the serious, egregious nature of Respondent's violation, thrusting at "the very heart of the Act" 12/,

12/ *A.J. Krajewski Mfg. Co.*, 180 N.L.R.B. 1071 (1970).

Respondent should also be required to cease and desist from any violation of the Act. 13/

VI.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following: 14/

ORDER

IT IS HEREBY ORDERED, that Respondent Eli Gordon, Gerald Tillinger and Seymour Tillinger, a co-partnership, doing business as Balsam Village Management Company, and their agents, successors and assigns, shall:—

A. Cease and desist from:

1. Discouraging or encouraging membership in any labor organization by discharging, terminating, laying off, furloughing, suspending, failing to recall or reinstate or rehire, threatening so to do, or otherwise discriminating in regard to the hire or tenure of employment or any term of condition of employment of any of its employees.

13/ *NLRB v. Enwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941); *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357 (1979).

14/ In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Section 102.48 of those Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Interfering with, restraining, or coercing any of its employees in the exercise of any of the rights guaranteed in Section 7 of the Act, through discharge, termination, layoff, furlough, suspension, failure to recall or reinstate or rehire, or other economic retaliation or threat thereof.

3. In any other manner interfering with, restraining, or coercing any employee in the exercise of the right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his or her own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

B. Take the following affirmative actions necessary to effectuate the policies of the Act:

1. Make the following employees whole for any loss of pay (including overtime, holiday, and vacation pay, and insurance benefits and reimbursements if any), together with interest, in the manner set forth in "The Remedy" portion of the decision of which this Order forms a part:

Carlos Casal
Mario Aguila
Daniel Santos.

2. Forthwith expunge from the personnel and employment records of each of said employees all statements or references that they (or any of them) were terminated or laid off by Respondent for any work-related fault, deficiency, or

reason; refrain from so reporting to any employer, prospective employer, employment agency, reference seeker, or credit or character inquiry, or that such action by Respondent was in any way related to any union or other lawful activity by any of said employees under the Act; and notify said employees in writing that such entries in Respondent's records have been expunged and that evidence of said terminations or layoffs will not be used as a basis for future personnel actions against them.

3. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, wage scale records and notations, social security payment records, timecards, personnel records and reports, and also all other records and entries necessary and appropriate to determine the amounts of backpay and other sums and benefits due under and the extent of compliance with the terms of this Order.

4. Upon request, bargain collectively in good faith with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of Respondent's employees in the following appropriate collective bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached:

> All building service employees, including porters, handymen and superintendents employed by Respondent at its Queens facility, exclusive of office

clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

5. Post at its premises at 88-15 133d Avenue, Borough and County of Queens, City and State of New York, copies of the Notice attached hereto marked "Appendix." 15/ Copies of said Notice, on forms provided by the Board's Regional Director for Region 29, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

6. Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: October 17, 1983

Stanley N. Ohlbaum
Administrative Law Judge

15/ In event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
an Agency of the
UNITED STATES GOVERNMENT

After a hearing at which all sides had the opportunity to present evidence and arguments, the National Labor Relations Board has decided that we have violated the National Labor Relations Act. We have therefore been ordered to post this Notice and do what it says.

The National Labor Relations Act gives all employees these rights:

—To engage, in self organization
—To form, join, or help unions
—To bargain collectively through representatives of their own choosing
—To act together for collective bargaining or other mutual aid or protection
—To refrain from any or all of these things.

Accordingly, we assure you that:—

WE WILL NOT violate these rights of yours.

WE WILL not terminate the employment of, discharge, lay off, suspend, or refuse to reinstate, rehire or reemploy you, or threaten to do so, because you seek to bargain collectively with us, or because you join or apply for membership in, affiliate with, designate as bargaining representative, or act on behalf of or in sympathy with, any labor organization, or because you exercise or seek to exercise any right under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of your own choosing; to engage in concerted protected activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL make whole the following employees for any wages and benefits lost by them because of their discharge by us on February 4, 1983, plus interest:—

Carlos Casal
Mario Aguila
Daniel Santos.

WE WILL at once eliminate from our records all indications that any of the above employees was discharged or laid off for any deficiency in work performance, or for union membership or activity; WE WILL NOT so report to any employer, prospective employer, employment agency, or credit or character inquiry; WE WILL NOT use such termi-

nations or layoffs as a basis for future personnel actions against said employees; and WE WILL so notify those employees in writing.

WE WILL, upon request, recognize and bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit, and embody in a signed agreement any understanding reached:

> All building service employees, including porters, handymen and superintendents employed by us at our Queens facility (Balsam Village), exclusive of office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

ELI GORDON, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP, d/b/a BALSAM VILLAGE MANAGEMENT COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

RECEIVED
DEC 19, 1984

No. 86-392

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ELI GORDON, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP d/b/a BALSAM VILLAGE MANAGEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unlawful threats against and discharge of its entire workforce, in retaliation for the employees' union activities, precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-392

ELI GORDON, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP d/b/a BALSAM VILLAGE MANAGEMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 792 F.2d 29. The decision and order of the National Labor Relations Board (Pet. App. B1-B4), including the decision of the administrative law judge (Pet. App. B5-B30), are reported at 273 N.L.R.B. 420.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1986. The petition for a writ of certiorari was filed on August 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates and manages an apartment complex in Queens, New York. Late in January 1983, petitioner learned that its three maintenance workers, Carlos Casal, Mario Aguila, and Daniel Santos, had signed cards authorizing Local 32B-32J, Service Employees International Union, AFL-CIO (Union), to represent them. Pet. App. B9-B10. Approximately one week later, on February 4, 1983, petitioner summoned employee Casal to the apartment complex management office and told Casal that "[w]e cannot afford Unions here." *Id.* at B11. Petitioner instructed Casal to talk Aguila and Santos "out of the Union" (*id.* at B12) and warned that, "if the men [did not] give up the union, then they [would not] have a job." *Ibid.* Casal conveyed petitioner's warning to Aguila and Santos, but both men indicated that they "wanted" and were "sticking with the Union". *Ibid.* Casal relayed their answer to petitioner, and added that he was "sticking with the union with the men." *Ibid.* Petitioner discharged all three men that day and did not respond to the Union's request for recognition and bargaining, which petitioner received a few days later. *Ibid.*

On February 8, 1983, Casal, Aguila, and Santos began picketing petitioner's premises. Pet. App. B13. Two and one-half weeks later, on February 25, 1983, petitioner approached them and informed them that they could return to their jobs if they would renounce the Union. *Ibid.* The three men refused and continued picketing petitioner's premises until mid-April 1983. *Ibid.*

Petitioner replaced Casal, Aguila, and Santos with six other employees, three of whom were hired before the picketing ceased in mid-April 1983. Pet. App. A6. Nevertheless, in June 1983, petitioner offered unconditionally to reinstate the three dischargees. Pet. App. B14. All three men declined petitioner's offer. *Id.* at B14.

2. The Union filed unfair labor practice charges with the National Labor Relations Board. Pet. App. B6. The Board, adopting the findings and conclusions of an administrative law judge, held that petitioner had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), (5). Pet. App. B1-B4. The Board found that petitioner had unlawfully threatened to discharge and then unlawfully discharged employees Casal, Aguila, and Santo because of their union membership. *Id.* at B2-B3. As a remedy, it ordered petitioner to cease and desist from its unfair labor practices, to provide the three dischargees with back pay to the date they declined petitioner's offer of unconditional reinstatement, and to meet and bargain with the Union upon request. *Id.* at B4, B18, B24-B27.

In ordering petitioner to bargain with the Union on request, the Board acknowledged that the Union had never formally been elected as the collective bargaining representative of petitioner's maintenance workers. Pet. App. B2-B3, B18-B23. But the Board held that petitioner's "unlawful actions in discharging the three employees, comprising the entire bargaining unit, * * * [were] deliberate, egregious and pervasive" (*id.* at B21), and that, "under the circumstances shown * * *" (*ibid.*), " 'the possibility of erasing the effects of [petitioner's] past practice and of ensuring a fair election * * * by the use of traditional remedies * * * [was] slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order' " (*id.* at B22, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969)). The Board did not believe that a fair election could be conducted; it found that "the 'employee turnover' in this case was a direct and obvious product of [petitioner's] own unlawful conduct" (Pet. App. B2) and that "withholding a bargaining order * * * would * * * 'reward[] [petitioner] * * * for his own misconduct' " (*id.* at B3, quoting *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2d Cir. 1980)).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A11). The court found "substantial evidence in the record to support the Board's findings that [petitioner] threatened to and did discharge its three maintenance employees on account of their union membership" (*id.* at A7). Furthermore, the court agreed with the Board that "[a]ll of the requirements for enforcement of a *Gissel* [bargaining] order ha[d] been met * * *" (*id.* at A9). In this regard, the court noted that the administrative law judge had found that petitioner's "actions had a continuing 'restraintful [*sic*] and coercive' effect after the discharge of the old employees and the hiring of the new" (*ibid.*), that "[t]he Board [had] adopted the ALJ's findings and reasoning" (*ibid.*), and that substantial evidence supported these findings (*id.* at A9-A10).

Like the Board, the court could not accept petitioner's contention that the complete turnover of the maintenance crew militated against issuance of the bargaining order. Pet. App. A10.The court noted that "[t]hree of the six new employees were hired while the discharged employees were picketing" and that these "new employees presumably [were] thus aware of [petitioner's] past treatment of its employees who chose to be represented by a union * * *" (*ibid.*). Thus, the court concluded that "the Board was well within the bounds of discretion to [find] * * * the likelihood of an untainted election remote" (*ibid.*). Concomitantly, the court noted that petitioner had itself caused the turnover and concluded that "[i]t would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge of all of the members of the bargaining unit" (*id.* at A10-A11).

Finally, the court rejected petitioner's contention that its offer unconditionally to reinstate the discharged employees made issuance of the bargaining order in this case unwarranted. Pet. App. A11. The court noted that the dischargees

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had reasonably sought other employment and that petitioner had already hired three replacement employees by the time it made the "belated" offers of reinstatement (*ibid.*). In these circumstances, "the purported offers of reinstatement did not constitute a mitigating circumstance sufficient to prevent issuance of a bargaining order" (*ibid.*).

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding that petitioner in fact unlawfully threatened to discharge and then unlawfully discharged employees Casal, Aguila, and Santos because of their union membership. Pet. 6. Rather, petitioner contends that the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 8-16. But the court's decision is correct and does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, this Court held that the Board may order an employer to bargain with a union not selected in a board election both in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices (395 U.S. at 613-614) and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (395 U.S. at 614). The Court found that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' " (395 U.S. at 610, quoting *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of

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ensuring a fair election * * * is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

The decision below follows straightforwardly from *Gissel*. The court found substantial evidence to support the Board's finding that petitioner threatened and discharged employees Calas, Aguila, and Santos because of their union membership, thus committing "hallmark violations" of the Act (Pet. App. A8-A10). Likewise, the court found substantial evidence to support the Board's finding that the replacement employees were aware of petitioner's policy toward union adherents, thus making the likelihood of an untainted election remote (*id.* at A9-A10). And the court agreed that petitioner's offer to reinstate Casal, Aguila, and Santos, coming almost four months after their discharge, did nothing to alleviate the complete turnover in the bargaining unit that petitioner itself had caused (*id.* at A10-A11). Since these are precisely the circumstances in which the *Gissel* Court contemplated that the Board would issue a bargaining order—to prevent an employer from "delay[ing] or disrupt[ing] the election processes [or from] put[ting] off indefinitely his obligation to bargain" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 610-611 (footnote omitted))—the court's decision to uphold such an order was correct.

2. Petitioner contends that this Court should grant certiorari to clarify "the degree and type of discussion required [by] the [Board]" to justify issuance of a *Gissel* bargaining order (Pet. 8). This contention is meritless.

The courts of appeals do not need any additional instruction from this Court concerning the findings and analysis that the Board must make to justify issuance of a *Gissel* bargaining order. The courts uniformly hold that the Board can issue a bargaining order only if it finds that "serious

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unfair labor practices by the employer have made it unlikely that a representation election can be conducted free of the taint of those practices" (Pet. App. A8). Accord, *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d 22, 30-31 (1st Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 263 (3d Cir. 1982); *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981); *NLRB* v. *Western Drug*, 600 F.2d 1324, 1325 (9th Cir. 1979). The courts also agree that a *Gissel* bargaining order can be sustained only if the Board has itself explained why a fair and reliable election cannot be conducted (see Pet. App. A8-A9; *NLRB* v. *American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1248 (1st Cir. 1982); *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108, 1119 (7th Cir. 1973)), or if an "ALJ has provided such findings and analysis and the Board has indicated its adoption of them" (Pet. App. A9; accord, *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d at 24 n.1; *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1081-1082). In short, there is no doctrinal confusion for this Court to clear up.[1]

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[1]The cases that petitioner relies on (Pet. 8-10) are not to the contrary. While the court in *NLRB* v. *Armcor Industries, Inc.*, 535 F.2d 239, 244-245 (3d Cir. 1976), refused to enforce a *Gissel* bargaining order because the Board had not made sufficient findings to support the order's issuance, the Third Circuit has made clear on several occasions that a bargaining order will be upheld if the Board expressly finds that the order is necessary to protect employee sentiments. See, *e.g.*, *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *NLRB* v. *Permanent Label Corp.*, 657 F.2d 512, 521 (3d Cir. 1981) (en banc), cert. denied, 455 U.S. 940 (1982). Similarly, though the court in *Kenworth Trucks of Philadelphia, Inc.* v. *NLRB*, 580 F.2d 55 (3d Cir. 1978), initially held that the Board could not rely on the findings of an administrative law judge in determining the need for a bargaining order (580 F.2d at 60), the court, on rehearing, *changed* its view (see *id.* at 61-63). Finally, while two Justices of this Court and Member Dennis of the Board have criticized the Board for issuing *Gissel* bargaining orders without adequately explaining why a fair and reliable election cannot be conducted (see *John Cuneo, Inc.* v. *NLRB*, 459 U.S. 1178, 1180-1181 (1983) (Rehnquist, J., dissenting); *Regency Manor Nursing Home*, 275

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Furthermore, contrary to petitioner's contention (Pet. 10-13, 14), the circuits are not in conflict concerning the effect employee turnover should have on the issuance of *Gissel* bargaining orders. The lower courts have uniformly held that turnover which an employer has itself caused is not a basis for finding that a fair and reliable election can be conducted. See, *e.g., NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100-101 (2d Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1082. The decisions in *NLRB* v. *Western Drug*, 600 F.2d 1324 (9th Cir. 1979), and *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), on which petitioner relies (Pet. 14-15, 15-16), are not to the contrary. In those cases, the challenged unfair labor practices did not cause the employers' workforces to turn over. See *NLRB* v. *Western Drug*, 600 F.2d at 1326-1327; *Franks Bros. Co.* v. *NLRB*, 321 U.S. at 706 (explaining *Fansteel*). Thus, those cases do not conflict with cases holding that a *Gissel* bargaining order is appropriate where the employer's unfair labor practices are in fact responsible for the turnover in the workforce.

Finally, petitioner's contention (Pet. 13-15) that the Board and the court below failed to articulate a rational basis for imposing a bargaining order is contrived. The Board and the court clearly articulated a rational basis for their decisions: the Board, adopting the findings and conclusions of the administrative law judge (see Pet. App. B2), concluded that a fair and reliable election could not be conducted (*id.* at B2-B3, B21-B23). The court, reviewing the Board's decision, found substantial evidence to support

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N.L.R.B. No. 171 (July 31, 1985) (opinion of Member Dennis)), those criticisms have no application to the issues in this case, where the Board expressly found that, and fully explained why, an election cannot be conducted free of the taint of petitioner's unfair labor practices. See Pet. App. A8-A10; *id.* at B2-B3, B21-B23.

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findings that petitioner's actions had a continuing impact on unit employees (Pet. App. A9-A10) and that there were no "mitigating circumstance sufficient to prevent issuance of a bargaining order" (*id.* at A11). Petitioner's true complaint is not that the decisions of the Board and the court have no rational basis, but rather that the factual findings on which those decisions are based are wrong. See Pet. 7-8, 13-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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